IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

GULF SHIPSIDE STORAGE CORPORATION,
Petitioner,

versus

UNDERWRITERS AT LLOYD'S, LONDON
AND/OR COMPANIES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Gulf Shipside Storage Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on March 31, 1960.

Citations to Opinions Below

The opinion of the United States District Court for the Eastern District of Louisiana, New Orleans Division (R. 567-578) printed in Appendix B hereto, *infra*, p. 14 is reported in 173 F. Supp. 105. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 24, is reported in 276 F. 2d 209.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on March 31, 1960; rehearing was denied on May 6, 1960. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Question Presented

Whether jurisdiction can be had over "Underwriters at Lloyd's, London and/or Companies" and if so whether Certificate No. WA-1994 in the name of "Underwriters at Lloyd's, London and/or Companies" and issued by J. K. Seear (USA) Limited, insurance brokers, is valid insurance.

Statute Involved

The statutory provisions involved are Louisiana Revised Statutes, Title 22, Section 655; Louisiana Revised Statutes, Title 22, Section 5 (2), Louisiana Revised Statutes, Title 22, Section 1253; and Louisiana Revised Statutes, Title 22, Section 1268. They are printed in Appendix A, infra, pp. 8-13.

Statement of the Case

Schwabach & Company sued your petitioner, Gulf Shipside Storage Corporation and "Underwriters at Lloyd's, London and/or Companies" under the Louisiana Direct Action statute[1] as insurers under a certain policy or policies of liability insurance No. WA-1994 and issued by J. K.

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[1]Louisiana Revised Statutes, Title 22, Sec. 655.

Seear (USA) Limited, insurance brokers. The respondents denied the Court's jurisdiction, denied that any 'Underwriters at Lloyd's, London or Companies had ever signed, bound or otherwise committed himself or itself for the coverage purportedly represented by Certificate No. WA-1994, and further averred that, in any event, the certificate itself was cancelled, rescinded and or withdrawn *ab initio*. Subsequently, petitioner filed a cross-claim against respondent, and a separate trial was held on the issue of coverage under Certificate No. WA-1994, at the conclusion of which the United States District Court filed its opinion to the effect that Certificate No. WA-1994 was validly terminated under Louisiana Law.[2]

An appeal was permitted under the Interlocutory Appeals Act,[3] and the United States Court of Appeals for the Fifth Circuit held that the District Court never did acquire jurisdiction over any identifiable defendants under Certificate No. WA-1994. The District Court held, as a matter of fact, that "The certificate, like the one in suit, is on a Lloyd's form. The certificate shows that it is issued in behalf of certain 'Underwriters, at Lloyd's, London and/or Companies' who 'bind themselves' each for his own part and not one for another, in favor of the assured to cover the risk described therein. The names of the subscribing underwriters are not shown on the certificate but their names, according to the certificate, should be on file with the insuring broker or with the Lloyd's broker in London. Here there is no documentary information concerning negotiations for, or the issuance of, the certificate in suit, nor

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[2]Louisiana Revised Statutes, Title 22, Sec. 636.
[3]28 U. S. C. Section 1292(b).

of underwriters thereon, the subpoena duces tecum being returned unsatisfied because all files concerning the matter had been shipped to London." (R. 570)

Reasons for Granting the Writ

1. The decision of the United States Court of Appeals is the first decision on the question of jurisdiction over Lloyd's in the United States, and in fact the opinion of the Circuit Court of Appeals does not refer to any decision whatsoever. The decision involves an important question of jurisdiction which has not been, but should be, settled by this Honorable Court.

2. Clearly, the question presented is of importance in the administration of justice as it affects billions of dollars of insurance coverage by Lloyd's of London in the United States of America. As the District Court held: "This case involves a phantom certificate of insurance issued, according to its face, by authority of certain unnamed 'Underwriters, at Lloyd's, London and/or Companies.' It demonstrates that anyone relying on such or similar certificates may find himself without insurance because, contrary to public belief, Lloyd's is not an insurer and certificates issued using its name are but hunting licenses to find who the unnamed insurers are, if indeed they do exist." (R. 568) The importance of the issues is further demonstrated in the opinion of the District Court as follows: "Certificate No. WA-1994 is on the usual Lloyd's form and is indistinguishable from thousands of other such certificates binding unnamed insurers at Lloyd's. For years the insurance business of the world has been conducted on the basis of such certificates. It is a little late in the day to refer to them

as scraps of paper. Unquestionably, as this case demonstrates, for the security of those who place their trust in such certificates, it would be better if the 'Underwriters, at Lloyd's, London and/or Companies' were named thereon. But assureds generally are not in a position to dictate the manner in which their certificates of insurance are issued, nor the content thereof." (R. 575-576)

Your petitioner herein did everything in its power to force the production of the "file" referred to in the certificate and used every legal means at its disposal to ascertain the names of the Underwriters. It was completely unsuccessful. If jurisdiction cannot be had on this certificate of insurance, none can be had on thousands of other identical certificates, as referred to by the District Court.

The question presented has been decided by a federal court on a question of law in conflict with a local law.

3. The decision of the Court of Appeals is in direct conflict with the Louisiana Revised Statutes which define an insurer as " 'Insurer' includes every person engaged in the business of making contracts of insurance, other than a fraternal benefit society. A reciprocal, an inter-insurance exchange or a Lloyds organization is an 'insurer' ".[4]

Under the provisions of Louisiana Law[5] the issuance of a contract of insurance by an unauthorized insurer subjects it to the jurisdiction of the courts of Louisiana.

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[4]Louisiana Revised Statutes, Title 22, Sec. 5(2).
[5]Louisiana Revised Statutes, Title 22, Sections 1253 and 1268.

A federal question is involved by virtue of the Commerce Clause of the United States Constitution.[6]

4. The decision of the Court below is believed to be erroneous, as it places an impossible burden upon petitioner and others similarly situated. The insured can never prove that specific Underwriters at Lloyd's or specific Companies accepted or otherwise committed themselves on a risk in the case of Lloyd's certificates of insurance unless such Underwriters or Companies voluntarily disclose themselves. The decision below thereby requires citizens of the United States to seek justice in the Courts of England. Such a decision cannot be correct. A reading of the facts in the opinion of the District Judge reveals the injustice of the opinion of the Circuit Court of Appeals.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK S. NORMANN

Counsel for Petitioner

August 2, 1960

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[6] U. S. Constitution, Article 1, Sec. 8.

UNITED STATES OF AMERICA
STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared FRANK S. NORMANN, who being first duly sworn did depose and say: that he is the attorney for the petitioner in the above entitled and captioned matter and a member in good standing of the United States Supreme Court Bar, and that he personally served the above and foregoing petition on Malcolm W. Monroe, Esq., attorney for Underwriters at Lloyd's, London and or Companies, and Ralph N. Jackson, Esq., attorney for Schwabach & Company, respondents in the above entitled and captioned matter, which said service was made on the 2nd day of August, 1960.

FRANK S. NORMANN

Frank S. Normann

Sworn to and subscribed before me
this 2nd day of August, 1960

(Signed) Leon S. Cahn

NOTARY PUBLIC

LEON S. CAHN
NOTARY PUBLIC PARISH OF ORLEANS,
STATE OF LOUISIANA
MY COMMISSION EXPIRES AT MY DEATH

APPENDIX A

Louisiana Revised Statutes, Title 22 § 655

§ 655. Liability policy; insolvency or bankruptcy of insured; direct action against insurer

No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action against the insurer may thereafter be maintained within the terms and limits of the policy by the injured person, or his or her survivors or heirs mentioned in Revised Civil Code Article 2315. The injured person or his or her survivors or heirs hereinabove referred to at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured or insurer is domiciled, and said action may be brought against the insurer alone or against both the insured and insurer jointly and in solido, at the domicile of either or their principal place of business in Louisiana. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the state of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the state of Louisiana. Nothing contained in this Section shall be

construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contracts are not in violation of the laws of this state.

It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable; and that it is the purpose of all liability policies to give protection and coverage to all insureds, whether they are named insureds or additional insureds under the omnibus clause, for any legal liability said insureds may have as or for a tort feasor within the terms and limits of said policy. Amended and reenacted Acts 1958, No. 125.

Louisiana Revised Statutes, Title 22 § 5

§ 5. General definitions

In this Code, unless the context otherwise requires, the following definitions shall be applicable:

* * *

(2) "Insurer" includes every person engaged in the business of making contracts of insurance, other than a

fraternal benefit society. A reciprocal, an inter-insurance exchange or a Lloyds organization is an "insurer".

Louisiana Revised Statutes, Title 22 § 1253.

§ 1253. Transacting business, constitutes appointment of agent for service of process

A. The transacting of business in this state by a foreign or alien insurer without a certificate of authority or the issuance or delivery by such foreign or alien insurer of a policy or contract of insurance to a citizen of this state or to a corporation authorized to do business therein, is equivalent to an appointment by such insurer of the secretary of state and his successor or successors in office to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding arising out of such policy or contract of insurance, and the said issuance or delivery is a signification of its agreement that any such service of process is of the same legal force and validity as personal service of process in this state upon it.

B. Such service of process shall be made by delivering and leaving with the secretary of state or with some person in apparent charge of his office two copies thereof and the payment to him of such fees as may be prescribed by law. The secretary of state shall forthwith mail by registered mail one of the copies of such process to the defendant at its last known principal place of business, and shall keep a record of all process so served upon him. Such service of process is sufficient, provided notice of such service and a copy of the process are sent within ten days thereafter by

registered mail by plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the postoffice with letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow. However, no plaintiff or complainant shall be entitled to a judgment by default, or a judgment with leave to prove damages, or a judgment pro confesso under this Section until the expiration of thirty days from date of the filing of the affidavit of compliance.

C. Service of process in any such action, suit or proceeding shall in addition to the manner provided in Subsection B of this Section be valid if served upon any person within this state who, in this state on behalf of such insurer, is

(1) Soliciting insurance, or

(2) Making any contract of insurance or issuing or delivering any policies or written contracts of insurance, or

(3) Collecting or receiving any premium for insurance; and a copy of such process is sent within ten days thereafter by registered mail by the plaintiff's attorney to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the postoffice with which the letter is registered,

showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

D. Nothing in this Section contained shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law. Amended and reenacted Acts 1958, No. 125.

Louisiana Revised Statutes, Title 22 § 1268

§ 1268. Legal process against line insurer

A. An unauthorized insurer shall be sued, upon any cause of action arising in this state under any contract issued by it as a surplus line contract, pursuant to this Part, in the district court of the parish in which the cause of action arose.

B. Service of legal process against the insurer may be made in any such action by service upon the secretary of state or some other person in his office whom he may designate during his absence. The secretary of state shall forthwith mail the documents of process served, or a true copy thereof, to the person designated by the insurer in the policy for the purpose by prepaid registered mail with return receipt requested. The insurer shall have forty

days from the date of service upon the secretary of state within which to plead, answer, or otherwise defend the action. Upon service of process upon the secretary of state in accordance with this provision, the court shall be deemed to have jurisdiction in personam over the insurer.

C. An unauthorized insurer issuing such policy shall be deemed thereby to have authorized service of process against it in the manner and to the effect as provided in this Section. Any such policy shall contain a provision stating the substance of this Section, and designating the person to whom the secretary of state shall mail process as provided in Sub-section B of this Section. Amended and reenacted Acts 1958, No. 125.

APPENDIX B

Schwabach & Company,

Plaintiff,

versus Civ. A. No. 6734

Gulf Shipside Storage Corporation, et al.,

Defendants.

United States District Court
E. D. Louisiana,
New Orleans Division.
April 15, 1959.

J. SKELLY WRIGHT, District Judge.

This case involves a phantom certificate of insurance issued, according to its face, by authority of a certain unnamed "Underwriters, at Lloyd's, London and or Companies." It demonstrates that anyone relying on such or similar certificates may find himself without insurance because, contrary to public belief, Lloyd's is not an insurer[1]

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[1] In Richards, Insurance, Vol 1, § 11, pp. 40, 41, it is stated:
"A Lloyds organization is essentially an association of persons who underwrite risks as individuals. The personal resources of each underwriter stand back of the fractional part of the loss which he assumes to insure against. Since liability is several and joint, each member of Lloyds is required to make a substantial deposit upon becoming a member, and all premiums collected are set aside in a trust fund to be held until the discharge of all liabilities under the policies. Today each underwriter is represented by an agent who in turn may represent a group of ten or fifty underwriters or a 'syndicate.' The agent has power to bind each member of his syndicate for predetermined fractions of whatever percentage of the entire risk the agent decides to write for the broker representing the applicant for insurance. Lloyds of London engages in every conceivable kind of insurance business, excepting only life insurance."

and certificates issued using its name are but hunting licenses to find who the unnamed insurers are, if indeed they do exist. Here Lloyd's denies their existence.

Schwabach and Company was the owner of cotton stored in the warehouse of the Gulf Shipside Storage Corporation. In this action it sues Gulf and its alleged liability insurer, "Underwriters, at Lloyd's, London and or Companies" for damage to the cotton while in storage. Gulf has cross-claimed against Lloyd's as its liability insurer. The only issue before the Court at this time is the validity of Certificate of Insurance No. WA-1994 covering warehouseman's legal liability and issued to Gulf "In accordance with authorization granted to J. K. Seear (U.S.A.), Ltd., by certain Underwriters, at Lloyd's, London and or Companies whose names and the proportions underwritten by them are or will be on file in the office of said J. K. Seear (U.S.A.), Ltd. and also on file in London, England."

J. K. Seear (U.S.A.), Ltd., a corporation chartered in Colorado, is a surplus line brokerage firm engaged in forwarding risks to J. K. Seear & Co., Ltd., London, Lloyd's insurance brokers. Although both Seear firms are incorporated, the individual, J. K. Seear, seems to be the principal figure in each. Seear (U.S.A.) has no floor privileges at Lloyd's. When there is a risk to be covered, it is forwarded to Seear, London, which offers it on the floor at Lloyd's

unless cover authority[2] for such risk is already available. Underwriters at Lloyd's deal only through Lloyd's brokers, such as Seear, London. Coverage of a risk at Lloyd's consists of the subscribing underwriters signing a slip indicating the amount of their participation. Once this slip is signed, covering a particular risk or for broker authority covering certain risks generally, a Lloyd's broker may issue the certificate of insurance.

In addition, a Lloyd's broker may give surplus line brokers in various countries, such as Seear (U.S.A.), authority to issue the certificate. The certificate, like the one in suit, is on a Lloyd's form. The certificate shows that it is issued in behalf of certain "Underwriters, at Lloyd's, London and/or Companies" who "bind themselves, each for his own part and not one for another, in favor of" the assured to cover the risk described therein. The names of the subscribing underwriters are not shown on the certificate but their names, according to the certificate, should be on file with the issuing broker or with the Lloyd's broker in London. Here there is no documentary information concerning negotiations for, or the issuance of, the certificate in

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[2]The expert witness, Fisk, in describing cover authority, stated:

"Well, cover authority, to begin with, your Honor, is normally something which is granted by underwriters at Lloyd's to a British broker. That broker is granted this authority to write within limitations of the cover, without having to go back to Lloyd's on what we call the 'open market' and place the risk. In other words, he is giving binding authority just as a local agent might be granted authority by the companies he represents. And that normally is subject to further approval by the leading underwriter. Surplus line brokers in the United States who are not British brokers would normally never be granted cover authority by underwriters at Lloyd's of London. The British broker having such authority from underwriters might, in turn, grant cover authority on his own to such a surplus line broker here in the United States, under similar terms and conditions." (Transcript, p. 106).

suit, nor of underwriters thereon, the subpoena duces tecum being returned unsatisfied because all files concerning the matter had been shipped to London.[3]

In August 1955, Bodet, an insurance broker generally handling the insurance problems of the defendant Gulf Shipside Storage Corporation, applied to J. K. Seear (U.S.A.) for Combined Warehousemen's Legal Liability and Fidelity Coverage for his client.[4] Seear (U.S.A.) advised Bodet that it would endeavor to have the risk accepted by underwriters at Lloyd's. In December 1955, Seear (U.S.A.) advised Bodet that it had succeeded in placing the risk and on January 11, 1956 Certificate WA-1994 insuring Gulf was sent from the office of Seear (U.S.A.) to Bodet.

Certificate No. WA-1994 is a broker's certificate issued by Seear (U.S.A.) on the customary Lloyd's form certifying that it is authorized to, and does thereby, bind, in accordance with the terms of the certificate, certain unnamed "Underwriters, at Lloyd's, London and/or Companies."

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[3]Preparatory to taking the deposition of Harold Stern, assistant secretary-treasurer of J. K. Seear (U.S.A.) Ltd., in Kansas City, Missouri, on June 6, 1958, attorneys for plaintiff obtained a subpoena duces tecum from the United States District Court for the Western District of Missouri, Western Division, calling for the production of all records relating to the Gulf Shipside insurance transaction on file in the office of J. K. Seear (U.S.A.) Ltd. None of this file was made available, either at the taking of the deposition or at the later trial of this issue. Stern explained that the file was sent to J. K. Seear & Co., Ltd., in London on or about January 2, 1958, "and that was in response to a letter they had written on December 30th saying to send the file." The amended complaint, bringing into issue the question of coverage under Certificate WA-1994, was filed August 15, 1957, a few months before the file containing information pertinent to the issuance of the certificate was ordered removed to London.

[4]At the time, neither Gulf nor Bodet had had prior dealings with Seear (U.S.A.). Seear (U.S.A.) had, however, solicited the placing of risks from Bodet.

As far as this record shows, no slip subscribed to by underwriters at Lloyd's covering this risk was ever issued. It should be stated again that a subpoena duces tecum served on Seear (U.S.A.) to produce the documents which would indicate whether this risk had been placed was returned unsatisfied because the Seear (U.S.A.) file which would have contained the names of the underwriters, if any, had been shipped to London.

By letter dated February 9, 1956 Seear (U.S.A.) advised Bodet that "the negotiations which we had completed regarding this risk have entirely fallen through" and that "inadvertently policies were issued for part of the risk which had been arranged tentatively and also your account was debited in error with the premium of this part of the risk." The letter ended stating "we should be very glad if you would reply to this letter confirming that you understand that no coverage whatsoever is in force on this risk." Bodet replied to the Seear (U.S.A.) letter of February 9, 1956 on February 16, 1956 as follows: "Thank you for your letter of February 9th which as stated to Mr. Stern is most disappointing. We have no alternative but to cooperate with you in your dilemma by accepting your no coverage advice."

Bodet testified that he advised the president of Gulf Shipside of the February 9th letter from Seear (U.S.A.) and that he was authorized by his principal to accept the no coverage advice contained therein. The president of Gulf Shipside, Weil, denies that he was so advised, insisting that he was under the impression throughout 1956 that the insurance was in effect. Unfortunately, there is no decisive documentary evidence which would resolve this conflict between Bodet and his principal. There is nothing in

writing in which Bodet advised Weil, nor is there anything in the written communications of Weil which would indicate that he was unaware, that the certificate in suit had been cancelled. An analysis of the account books of Bodet and Gulf is also unavailing. In May 1956 Gulf's open account with Bodet was credited with the return of the premium, but Gulf's books reflect no corresponding entry.

(1) The defendants, "certain Underwriters, at Lloyd's, London and or Companies," first maintain that this Court does not have jurisdiction over them and that the service of process is deficient. Since an insurance company which accepts a risk in a state subjects itself to the jurisdiction of the courts of that state as well as to service of process provided by the laws thereof, this defense is without merit.[5] The second defense is simply that Certificate No. WA-1994 was never in force since no subscribers to the risk have been shown, at Lloyd's or elsewhere. Finally, underwriters say that, in any event, the certificate was "cancelled, rescinded and or withdrawn ab initio by J. K. Seear (U.S.A.) Ltd. in February of 1956," months before the damage in suit occurred.

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[5] *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223; LSA-R.S. 22:1253, subd. A, which reads as follows:

"A. The transacting of business in this state by a foreign or alien insurer without a certificate of authority and the issuance or delivery by such foreign or alien insurer of a policy or contract of insurance to a citizen of this state or to a resident hereof, or to a corporation authorized to do business herein, is equivalent to an appointment by such insurer of the Secretary of State and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding arising out of such policy or contract of insurance, and the said issuance or delivery is a signification of its agreement that any such service of process is of the same legal force and validity as personal service of process in this state upon it." • • •

The position of plaintiff Schwabach & Company, as well as the cross-claimant, Gulf Shipside, is also a model of simplicity. Citing authorities,[6] they state that since the certificate was issued by one having apparent authority, the principal is bound thereon irrespective of actual assent thereto. They say further that the underwriters at Lloyd's cannot avoid their responsibility on the certificate by remaining incognito. As to the alleged cancellation, they maintain that the laws of Louisiana prescribe certain formalities for the cancellation of insurance such as written notice "to the insured or to his representative in charge of the subject of the insurance"[7] and that these requirements have not been complied with.

It is indeed unfortunate that the records of Secar (U.S.A.) concerning the negotiation for and placement of the risk in suit are not available. These records would doubtless disclose which, if any, underwriters subscribed to the risk. Absent these records, Schwabach and Gulf Shipside are rele-

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[6]Restatement, Agency 2d §§ 159, 160; 2 Am. Jur., Agency §§ 101, 102.

[7]LSA - R.S. 22:636, subd. A reads as follows:

"A. Cancellation by the insurer of any policy which by its terms is cancellable at the option of the insurer, or of any binder based on such policy, may be effected as to any interest only upon compliance with either or both of the following:

"(1) Written notice of such cancellation must be actually delivered or mailed to the insured or to his representative in charge of the subject of the insurance not less than five days prior to the effective date of the cancellation."

* * *

Certificate WA - 1994 contained this provision in its cancellation clause:

"* * *This Certificate may also be cancelled by or on behalf of Underwriters by 10 days' notice given in writing to the Assured, his broker or agent, at his last known address, and the premium hereon shall be adjusted on the basis of the Underwriters receiving or retaining pro rata premium. Notice shall be deemed to be duly received in the course of post if sent by pre-paid letter post properly addressed."

gated to an attempt to show apparent authority to bind "certain Underwriters, at Lloyd's London and or Companies" by Seear (U.S.A.). The certificate in suit itself indicates that the risk was covered by such underwriters, and it is further shown that Seear (U.S.A.) habitually used the Lloyd's certificate form to certify coverage of risk to assureds without showing thereon who the subscribing underwriters are, all in accordance with standard Lloyd's practices. These facts, according to Schwabach and Gulf, make out a case of apparent authority which estops the defendant insurers from denying coverage on the risk in suit. Defendant, outlining at length the manner in which Lloyd's does business, states that the certificate in suit is but a scrap of paper and that the unnamed underwriters shown thereon as binding themselves to the risk simply do not exist.

Certificate No. WA-1994 is on the usual Lloyd's form and is indistinguishable from thousands of other such certificates binding unnamed insurers at Lloyd's. For years the insurance business of the world has been conducted on the basis of such certificates. It is a little late in the day to refer to them as scraps of paper. Unquestionably, as this case demonstrates, for the security of those who place their trust in such certificates, it would be better if the "Underwriters, at Lloyd's, London and or Companies" were

named thereon.[8] But assureds generally are not in a position to dictate the manner in which their certificates of insurance are issued, nor the content thereof.

(2) Fortunately, it is not necessary to resolve this issue of apparent authority. Assuming that Certificate No. WA-1994 was validly issued, apparently or otherwise, the risk thereunder was validly terminated by Bodet's acceptance of Seear U.S.A.'s no coverage advice contained in its letter of February 9, 1956. The letter of February 9th states plainly that "no coverage whatsoever is in force on this risk." Bodet, Gulf's insurance representative, accepted for Gulf this no coverage advice and the accounts of both Seear (U.S.A.) and Bodet were adjusted to reflect this situation.[9]

(3, 4) Gulf's denial that it was advised of and approved Bodet's action, even if accepted, cannot save the certificate. Compare *Romero v. Maryland Cas. Co., supra.* Unquestionably, Bodet was Gulf's agent in general charge of its insurance problems and notice to and acceptance by him of the no coverage advice, not only binds his principal, but com-

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[8] See an article by Herbert A. Kuvin, "Lloyd's of London and Problems Arising by Reason of Its Business in this Country," Insurance Law Journal, June, 1954, pp. 406, 420, which states:

"While said certificate states that there is a division of the risk between underwriters at Lloyd's and British companies, nevertheless, the insurance has generally been considered being placed at Lloyd's, and, in the past, many insureds have taken full credit for reinsurance bound under such a certificate.

• • • • •

"Lloyd's brokers, desiring to continue to do business in this country, should take steps to correct these practices. Broker's cover notes should show the proportion placed with Underwriters at Lloyd's and the proportion with British Companies. Properly signed and stamped policies should be delivered within a reasonable time."

[9] See LSA - R.S. 22:636, subd. D, compare *Romero v. Maryland Cas. Co.*, 223 La. 783, 66 So. 2d 849.

plies with the formality for cancellation of insurance as required by LSA-R.S. 22: 636, subd. A(1). This finding is in accord, not only with the statutory requirement[10] for cancellation but with the Louisiana jurisprudence,[11] and jurisprudence generally[12] on the subject. Bodet here had general authority from his principal not only to obtain, but

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[10]There has been no judicial construction of the language of LSA-R.S. 22:636, subd. A(1), which reads: "Written notice of such cancellation must be actually delivered or mailed to the insured • • •." Similar language in Paragraph D of LSA-R.S. 22:636, however, requiring that, on cancellation, any unearned premium paid to the insurer "must be actually paid to the insured" has been interpreted by the Louisiana Supreme Court in *Romero v. Maryland Cas. Co., supra*. In Romero, the Court held a policy properly cancelled under Paragraph D where the assured kept a running account with a local insurance agency, as did Gulf with Bodet here, and where, as here, the local agency credited its client with the unearned premium. In those circumstances, the Court held that the unearned premium was "actually paid to the insured" under the language of the statute.

[11]*American Fidelity & Casualty Co., Inc. v. Knox*, D. C., 164 F. Supp. 3; *Brown v. North River Ins. Co. of N. Y.*, 144 La. 504, 80 So. 674.

The Louisiana Supreme Court in *Brown v. North River Ins. Co. of N. Y., supra*, while holding that notice to a subagent, unknown to the assured, is not notice of cancellation to the assured, quotes, with approval, 80 So. at page 677, the following excerpt from Clement, Fire Insurance, Vol. 2, p. 418:

"If a broker or agent has general authority from his principal, not only to obtain, but to maintain, insurance, placing and replacing same according to circumstances, in his discretion, having general charge of his principal's insurance, then he may be the agent of the insured for purposes of cancellation and substitution, and the five days' notice required may be dispensed or waived by him. The authority of such an agent or broker becomes a question of fact. A broker is an agent of the insured, and an insurance company is justified in regarding him as clothed with full authority to act for the insured in procuring, modifying, or cancelling a policy, and his acts in respect thereto are the same as if done by his principal."

[12]29 Am. Jur., Insurance § 286. This authority at p. 266 states:

"• • • (I)f the insured constitutes one an agent not only to insure but to keep property insured, with power to select the insurer, notice of cancellation to such agent will bind the insured. A fortiori, the rule is well settled that where the insured authorizes an agent or broker to procure, keep up, cancel, and substitute policies, notice of cancellation given to such agent or broker is a sufficient notice to the insured."

to maintain insurance, placing and replacing it according to circumstances. While his authority to accept the notice of cancellation for his principal is a question of fact, such authority need not be proved directly or expressly. Where the principal has clothed the broker with full authority to act for it on the subject of insurance, notice to him of cancellation is, in law, notice to his principal.

Judgment accordingly.

Ex parte UNDERWRITERS AT LLOYD'S LONDON and/or Companies,
Motion for Leave to File Petition for Mandamus and Prohibition.

Gulf Shipside Storage Corporation,
Appellant,
versus

Underwriters at Lloyd's London and/or Companies, and Schwabach and Company,
Appellees.

Nos. 17935 and 17971

United States Court of Appeals
Fifth Circuit.
March 31, 1960.
Rehearing Denied in No. 17971
May 6, 1960.

Before RIVES, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

PER CURIAM.

Schwabach & Company sued Gulf Shipside Storage Corporation and, under the Louisiana direct action statute,[1] certain underwriters of insurance for damages allegedly resulting from Gulf Shipside's failure properly to store and handle Schwabach's cotton. The cotton had been delivered to Gulf Shipside "commencing on or about July 18, 1956." The liability insurers first sued denied any coverage earlier than November 29, 1956, the earliest date on which, in any event, their policies could have been effective.

Schwabach then filed a supplemental complaint naming as additional defendants "Underwriters at Lloyds, London, and/or Companies signatories to, as underwriters thereof, a certain policy or policies of liability insurance" numbered WA-1994 and issued on January 11, 1956, by J. K. Seear (U.S.A.) Ltd., insurance brokers. Certain attorneys appeared and filed an answer to the supplemental complaint in which they denied the court's jurisdiction over any parties defendant; denied that any underwriter at Lloyd's or Companies had "ever signed, bound or otherwise committed himself or itself, for the coverage purportedly represented by Certificate No. WA-1994"; and averred that, in any event, the certificate itself was "cancelled, rescinded and/or withdrawn *ab initio* by Seear (U.S.A.)" in February 1956, by notice to Adrien Bodet, Gulf Shipside's insurance broker, months before the damage suit occurred.

Subsequently, Gulf Shipside filed a cross-claim under Certificate WA-1994 against "defendant Underwriters at

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[1]LSA - R.S. 22:655.

Lloyd's London and/or Companies," demanding that they "defend (Gulf Shipside) at their cost" in this proceeding. The same defenses, contained in the answer to the supplemental complaint, were urged to the cross-claim.

A separate trial was held on the issue of coverage under Certificate WA-1994, at the conclusion of which the district court filed its opinion that, "assuming (but not deciding) that Certificate No. WA-1994 was validly issued, apparently or otherwise, the risk thereunder was validly terminated" by Seear (U.S.A.)'s February 1956 notice to Mr. Bodet, because "Bodet was Gulf's agent in general charge of its insurance problems and notice to and acceptance by him of the no coverage advice, not only binds the principal, but complies with the formality for cancellation of insurance as required by LSA-R.S. 22:636, subd. A (1)."[2]

From the judgment or order entered pursuant to that opinion, an appeal was permitted under the Interlocutory Appeals Act,[3] and it was further ordered that the motion for leave to file petition for writs of mandamus and prohibition be heard at the same time as said appeal.

The full and excellent opinion of the district court cited in footnote 2, supra, relieves us of the necessity for a detailed statement of the facts and issues. We find ourselves in general agreement with that opinion, but with certain important exceptions which require a somewhat different decision.

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[2]The district court's opinion is reported as *Schwabach & Company v. Gulf Shipside Storage Corp.*, D.C.E.D.La. 1959, 173 F. Supp. 105, 109, 110.

[3]28 U.S.C.A. § 1292(b).

There was no evidence that any underwriter at Lloyd's or any Company had ever accepted, or otherwise committed itself for, the risk described in Certificate WA-1994. There was a complete lack of evidence to prove that J. K. Seear (USA), Ltd. had an authority, either actual or apparent, to bind any individual underwriter at Lloyd's or any Company on the risk identified in the said certificate. No premium for the coverage was ever remitted to any underwriter at Lloyd's or to any Company sought to be made a defendant to the supplemental complaint. Certificate WA-1994 actually amounted to no more than a broker's certificate. It created an obligation on the part of J. K. Seear (USA), Ltd., but it alone could not bind an underwriter or company which had not committed itself for the risk described.

The district court never did acquire jurisdiction over any identifiable defendant to the supplemental complaint or to the cross-claim under Certificate WA-1994. Its judgment is therefore reversed, and the cause remanded with directions to dismiss said supplemental complaint and cross-claim for lack of jurisdiction. Costs of appeal are taxed against the appellant.

The issues having been thus decided, there is no necessity for the filing of the petition for mandamus and prohibition.

Leave denied, reversed with directions.

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Office Supreme Court, U.S.
FILED
AUG 22 1950
JAMES H. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 290

GULF SHIPSIDE STORAGE CORPORATION,
Petitioner

versus

"UNDERWRITERS AT LLOYD'S, LONDON AND/OR COMPANIES",
Respondent

OPPOSITION TO PETITION FOR CERTIORARI

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Of Counsel

SUPREME COURT OF THE UNITED STATES

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Respondent

OPPOSITION TO PETITION FOR CERTIORARI

This case is not appropriate for review by this court, because (1) the only disputed issues are questions of fact;[1] and (2) the petition for certiorari presents for review, only two of the three issues of fact originally presented in the litigation.

The finding below, adverse to petitioner, on the other fact issue—not presented to this court by petitioner—is itself adequate to support the decree of the Court of Appeals.

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[1] *Cf. Graver Mfg. Co. vs Linde Co.*, 336 US 271 (1949), on rehearing, 339 US 605; *Southern Power Co. vs North Carolina Public Service Co.*, 263 US 508 (1924); *Houston Oil Co. vs Goodrich*, 245 US 440 (1918).

The case involves a certificate, issued by an insurance broker, advising an assured that the broker had effected coverage of a risk with unnamed "Underwriters at Lloyd's, London and or Companies".

The basic legal question in the case, is simply whether underwriters (named or unnamed) can be bound on a risk by an insurance broker who has no express, implied or apparent authority in that regard. The negative answer to this question is well settled,[2] and was not disputed by petitioner in this case.

The contested issues in the case were:

1—Did the broker who issued the certificate on which petitioner sued, have any express, implied or apparent authority, to bind any underwriters at Lloyd's on the risk covered by the certificate?

2—If the broker did not have such authority, did the district court have jurisdiction over unidentified and unidentifiable "Underwriters at Lloyd's, London and or Companies"?

3—Assuming *arguendo* that the broker had such authority, was the coverage under the certificate terminated before the loss in suit occurred?

The District Court reserved decision on the first question, held, on the second, that it had jurisdiction, and then decided against petitioner on the ground that any coverage under the certificate "was validly terminated" before the loss occurred.

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[2] 16 Appleman, *Insurance Law and Practice* 78, section 8672.

The Court of Appeals held against petitioner on the first question, since "there was a complete lack of evidence to prove that (the broker) had any authority, either actual or apparent, to bind any individual underwriter at Lloyd's or any Company on the risk identified in the said certificate"; held, on the second question, that the District Court "never did acquire jurisdiction over any identifiable defendant"; and affirmed the finding of the District Court that, in any event, the certificate had effectively been withdrawn by the broker before the loss occurred.

So far from being a case of first impression, as stated on page 4 of the petition for certiorari, the legal principle that an underwriter cannot be bound by an unauthorized broker, is, as noted above, well-settled; and this principle has been applied to underwriters at Lloyd's in at least five decisions, all of which were cited in brief to, and were considered by, the court *a quo*.[3]

Finally, the finding below, that any insurance coverage which might have existed under the certificate, was validly terminated before the loss occurred—which, of itself, fully supports the judgment—is not even presented by petitioner for review, so that the judgment below could not be reversed, even if this court should

[3] *Ell Dee Clothing Co. vs Marsh*, 247 NY 392, 160 NE 651 (1928); *Ater Manufacturing Co. vs Lloyd's*, 139 FS 314 (WD Ark.-1955); *Hauhow vs Stewart Smith & Co.*, 84 Ll. L. Rep. 504 (KB-1951); *Winters, vs Arnold*, Docket No. 18991-PH, U.S. District Court, Southern District of California (1957-unreported); and *Martinette vs Lloyd's at London*, Docket No. 2222, Court of Law and Chancery, City of Norfolk, Virginia (1959-unreported).

agree with petitioner, that insurance coverage by "Underwriters at Lloyd's, London and/or Companies" was provided by the certificate in the first instance.[4]

It is respectfully submitted that the petition for certiorari should be denied.

Eberhard P. Deutsch,
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Deutsch, Kerrigan & Stiles,
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August, 1960

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[4] *Cf. Herb vs Pitcairn*, 324 US 117, 126 (1945): "Our power is to correct wrong judgments, not to revise opinions".